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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73 606(b)	)	
Table of Allotments,	)	
Television Broadcast Stations	)	
(Bath, New York)	)	MM Docket No. _____
	)	RM-_____
Amendment of Section 73.622(b)	)	
DTV Table of Allotments	)	
Digital Television Broadcast Stations	)	
(Syracuse, NewYork)	)	

To The Commission

APPLICATION FOR REVIEW

Paxson Syracuse License, Inc. ("Paxson"), licensee of commercial television station WSPX-TV, Syracuse, New York (the "Station"), by its attorneys and pursuant to Section 1.115(a) of the Commission's rules,[1] hereby files this Application for Review of the Media Bureau's dismissal of the above-captioned Petition for Rulemaking to amend the TV and DTV Tables of Allotments (the "Petition").[2]

INTRODUCTION

The Bureau erred in dismissing the Petition by (1) improperly forbidding single-channel broadcasters from requesting a paired DTV allotment; (2) favoring a dormant seventeen-year old application seeking a new analog television station in Bath, New York, over Paxson's proposal to begin offering DTV service immediately to Syracuse, New York; and (3) applying the

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[1] 47 C.F.R. § 1.115(a).

[2] The Media Bureau issued its letter ruling denying Paxson's Petition (the "Letter Ruling") on February 17, 2004 This Application for Review is timely filed pursuant to Sections 1.4(b) and 1 115(d) of the Commission's rules 47 C.F.R. §§ 1.4(b), 1 115(d).

incorrect interference standard to the Petition. The Bureau should not have the opportunity to revisit these issues because an intervening Commission ruling confirming the Bureau's procedurally defective change in the Commission's rules deprives the Bureau of the ability to cure its errors [3] Instead, the Commission must itself reverse the Bureau's Letter Ruling and remand this matter to the Bureau with directions to issue a Notice of Proposed Rulemaking to consider Paxson's proposal.

I. THE LETTER RULING REPRESENTS AN IMPERMISSIBLE CHANGE IN COMMISSION POLICY THAT CAN ONLY BE ACCOMPLISHED THROUGH NOTICE AND COMMENT RULEMAKING.

In the Letter Ruling, the Bureau found that the Commission's 1998 decision not to assign paired DTV channels to NTSC permittees whose applications were granted after April 3, 1997 barred the Bureau from accepting the Petition. The Bureau further found that the only option available for single-channel analog broadcasters to convert to DTV is flash-cut to digital on their existing analog channel at the close of the DTV transition. In *Muskogee*, the Commission approved this change in Commission policy These holdings violated fundamental principles of administrative law.

In the *Fifth DTV Report and Order*, the Commission issued paired DTV channels to all television stations holding an NTSC license or construction permit as of April 3, 1997.[4] This was in fulfillment of Congress's direction that if the Commission were to issue paired channels, it was required to issue them to all NTSC licensees and permitees as of the pertinent date.[5] The

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[3] Muskogee, Oklahoma, *Memorandum Opinion and Order*, FCC 03-321 (rel. March 2, 2004) ("*Muskogee*") *See also* 47 C.F.R. § 1.115(b)(2)(iii).

[4] Advanced Television services and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, 12816-16a (1997) ("*Fifth DTV Report and Order*")

[5] 47 U.S.C.A. § 336(a).

Commission repeatedly referred to this set of broadcasters as having "initial eligibility for DTV licenses." The Commission noted that television broadcasters whose NTSC licenses were granted after April 3, 1997, would be afforded the opportunity to construct a single-channel digital station or convert their NTSC station to DTV at a future point during the DTV transition.[6] Never, however, did the Commission state that paired DTV channels only would be issued to those licensees and permittees that initially were awarded channels, and that intention certainly does not flow naturally from Section 336(a) of the Act, which only creates minimum qualifications for a paired allotment and does not in any way limit the Commission's authority to award additional paired DTV channels

The Letter Ruling and *Muskogee* extend the Commission's "initial" eligibility decision to permanently deprive single-channel analog broadcasters like Paxson of a paired DTV channel. This represents a fundamental expansion of and shift in Commission policy that could be accomplished properly only through notice and comment rulemaking. While agencies have a discretion to establish rules through legislative rulemaking or adjudication, that discretion is not unlimited.[7] The District of Columbia Circuit has held that it is "a maxim of administrative law that if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first, and, of course, an amendment to a legislative rule must itself be legislative."[8] In the instant case and in *Muskogee*, the Commission has violated this maxim

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[6] Advanced Television services and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6865 (1998).

[7] *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 808 n.29 (1978) (agency possesses "substantial discretion"), *NLRB v Bell-Aerospace Co.*, 416 U.S. 267 (1974) (agency acting through adjudication would abuse its discretion if affected parties to case are not given a full right to be heard)

[8] *National Family Planning and Reproductive Health Association, Inc. v Sullivan*, 979 F.2d 227 (D C. Cir. 1992) (citation omitted).

by amending its rules through adjudication to the detriment of all single-channel analog broadcasters without giving them sufficient opportunity for notice and comment. This closely resembles *Sprint Corp. v. FCC*,[9] in which the FCC adopted a rule after notice and comment rulemaking and then amended that rule through an order without first issuing notice of the proposed change The D C. Circuit reversed the Commission's amendment, pointing out that although the Commission must have the flexibility necessary to adjust its regulatory schemes to new problems, that does not permit the Commission to alter substantively the rights of regulated parties without providing them sufficient notice and opportunity for comment.[10]

In this case, Paxson reasonably presumed, based on Commission policies favoring a swift transition to DTV and the fact that the Commission never ruled out paired allotments for single-channel broadcasters, that the Commission would process requests for paired channels from stations that could commit to placing DTV stations into operation quickly. The Commission's decision here and in *Muskogee* defeats that reasonable expectation in a manner that undermines Paxson's interests and is contrary to the public interest. Paxson's parent company, PCC, owns 5 stations that were not granted a paired DTV channel. Those are 5 markets in which PCC is precluded from participating in the DTV transition, and 5 markets that will not digitally receive PCC's unique brand of family friendly programming. Neither the Commission's decision in *Muskogee* nor the Bureau's Letter Ruling in this case explains how denying paired channels to broadcasters that are committed to building DTV stations will further the DTV transition or provide optimal service to viewers. In short, these decisions likely could not have been supported by a record developed in a notice and comment proceeding, so adoption in an adjudication is both unwise and improper

[9] 315 F.3d 369 (2003)

II. THE RULE AND RESULT HERE AND IN *MUSKOGEE* IS CONTRARY TO THE PUBLIC INTEREST.

Even if the Commission's decision in *Muskogee* and the Bureau's decision in the instant case were procedurally sound, they still would be unreasonable. When the Commission assigned the allotments contained in the DTV Table, it envisioned a highly accelerated DTV transition and accordingly adopted implementation policies designed to facilitate a rapid transition.[11] Indeed, Congress itself subsequently codified the Commission's 2006 target date for ending the DTV transition [12] Thus, in 1997, the decision to leave certain stations without a paired allotment during an expectedly short transition period was not considered debilitating to single-channel broadcasters

Unfortunately, that rapid transition has not come to pass. Questions, for example, about the robustness of the DTV transmission format, the capability of DTV tuners, the security of digital content, and the interoperability of cable and consumer electronic equipment have hindered the transition.[13] Even with the slow pace of the transition, however, spectrum recovery

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[10] *See id.* at 377.

[11] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 6 ("The more quickly that broadcasters and consumers move to digital, the more rapidly spectrum can be recovered"), 37 (explaining that decision to allow broadcasters flexibility to broadcast non-high definition digital signal designed to facilitate "rapid transition"), 97 ("One of our overarching goals in this proceeding is the rapid establishment of successful digital broadcast services that will attract viewers from analog to DTV technology, so that the analog spectrum can be recovered") (1997) ("*Fifth Report and Order*")

[12] The Balanced Budget Act of 1997 added a new Section 309(j)(14) to the Communications Act That section states that "[a] broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006" unless the Commission grants an extension based on specific enumerated criteria. 47 U.S.C. Sec. 309(j)(14). *See also Fifth Report and Order*, ¶ 99 (setting 2006 target date for return of analog spectrum)

[13] *See, e.g.*, Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 16 FCC Rcd 5946, ¶¶ 98-105 (2001); Digital Broadcast

for public safety services – always a significant element of the Commission's DTV policies – has become even more important as a result of the attacks of 9/11, further compelling the need for a rapid transition. In response, the Commission, hoping to accelerate market penetration and facilitate the close of the transition, embraced more aggressive policies to place DTV stations into operation as quickly as possible.[14] Congress responded as well Concerned about the pace of the transition and the acceptance by consumers, Congress required the Commission to assign paired allotments upon request to a number of single-channel stations to promote "the orderly transition to digital television, and to promote the equitable allocation and use of digital channels."[15]

Now, after several years and all these delays and developments, it would be disingenuous to argue that the Congressional restriction on *initial* eligibility should prevent the assignment of a DTV allotment to WSPX-DT or other similarly situated single-channel broadcasters. Assignment of a new DTV allotment would allow the Station to become a full participant in DTV and generally would facilitate the implementation of digital television. DTV is critical to the future of all broadcasters, but especially to PCC, which has spearheaded efforts to introduce

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Copy Protection, *Notice of Proposed Rulemaking*, MB Docket No. 02-230, FCC 02-231, ¶¶ 3-9 (rel Aug. 9, 2002); Compatibility Between Cable Systems And Consumer Electronics Equipment, *Report and Order*, 15 FCC Rcd 17568 (2000).

[14] *See* Remedial Steps For Failure to Comply With Digital Television Construction Schedule; Requests For Extension of the October 5, 2001, Digital Television Construction Deadline, *Order And Notice Of Proposed Rulemaking*, 17 FCC Rcd 9962, ¶ 16 (2002) (adopting sanctions for failure to timely construct DTV stations); Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594 ¶¶ 34-36 (allowing DTV stations to commence operations at low power)

[15] The Public Health, Security, and Bioterrorism Preparedness and Response Act of 2002, § 531(a), Pub. L. No 107-188, 116 Stat. 594, enacted June 12, 2002.

innovative digital services such as multicasting that promise to unlock to consumers the full potential of DTV.[16]

With a paired DTV allotment, the Station would ensure that existing service to viewers is preserved during the transition. Those viewers capable of receiving digital signals would receive the benefits of enhanced WSPX-DT programming. Viewers who have not purchased digital equipment would not be disenfranchised. Equally important, a new DTV allotment would increase the amount of digital content available to viewers, thereby creating additional incentive for consumers to purchase digital equipment and facilitate the recovery of spectrum. Also, a paired, in-core allotment would allow the Station to carry out an "orderly" transition to digital, consistent with Congressional wishes, and would avoid the need to identify and switch to an in-core allotment after the close of the DTV transition.[17] Accordingly, the preponderance of public interests clearly weigh on the side of reversing the Bureau's Letter Ruling and the *Muskogee* decision

III. THE BUREAU ERRED IN PREFERRING A 17-YEAR OLD APPLICATION FOR A NEW NTSC STATION OVER THE PETITION.

The Bureau also erred in concluding that an application for a new NTSC station filed nearly 17 years ago is preferable to Paxson's proposal for a paired DTV channel that would quickly begin providing service to the Syracuse community.[18] The Bureau stated that Paxson

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[16] In addition, PCC has expended a great deal of its resources aiding the Commission in Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules Carriage of the Transmissions of Digital Television Broadcast Stations Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Order on Reconsideration of the Third Report and Order*, 16 FCC Rcd 21633, ¶10 (2001).

[17] *See Bioterrorism Act*, § 531(a) (describing purpose of providing paired allotments to single-channel broadcasters as "promot[ing] the orderly transition to digital television").

[18] *See* FCC File No. BPCT-19870331LW (the "Bath Application").

has failed to identify any policy justifying preferring the Petition over the Bath Application, but such policies are self-evident.

The Commission is required by statute to administer the public spectrum in the public interest.[19] The Bureau failed to explain how indefinitely reserving spectrum for an entity with an ungranted application, who has never provided service to the public, serves any identifiable public interest. The Bath Application is 17 years old The Commission owes it to the applicant, the public, and to other broadcasters that can make use of the spectrum to resolve the Bath Application consistent with the public interest. Allowing it to linger for this extended period of time is simply inconsistent with the Commission's congressionally delegated duties. As Paxson showed in the Petition, Paxson's proposal represents the best current use of this spectrum.

The Commission is further required to promote the provision of new technologies to the public.[20] Obviously, this policy extends to the introduction of DTV The Bureau failed to explain how preferring the 17-year-old Bath Application over the Petition will hasten the roll-out of DTV to all viewers, particularly those in Syracuse who would be deprived of a new DTV voice if the Letter Ruling stands.

There is simply no justification for allowing available broadcast spectrum to lie fallow at a time when the entire television broadcasting industry is attempting to move together into the DTV era. The Commission's past reluctance to consider requests for paired allotments was based in part on concern that creating paired allotments would deter new licensees and consequently impair a diversity of broadcast voices.[21] Neither of these concerns is remedied by allowing Channel 14 to remain unused. Grant of the requested allotment change would, however,

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[19] 47 U.S.C A. §§ 151, 301.

[20] 47 U.S.C.A. § 157.

[21] *See Second MO&O*, ¶ 18.

ensure that existing viewers of the Station would not lose service and would receive full DTV service more quickly. Contrary to the Bureau's finding that "no rule or policy . . . support[s]" preferring Paxson's Petition to the Bath Application, it is hard to identify a Commission policy or responsibility that does not offer support.

IV. The Bureau Applied the Wrong Interference Standard to the Petition.

The Bureau also held that the Petition fails because it is short-spaced to WPBS-TV, Watertown, New York In reaching this conclusion, the Bureau erred by applying to Paxson's Petition the minimum distance separations contained in Section 73.623(d).[22] Section 73.623(d) applies to new DTV allotments, but Paxson's Petition requests the reassignment of an existing allotment for use as a paired channel. Accordingly, the Bureau should have applied the interference criteria for existing allotments that is contained in Section 73.623(c).[23] This rule permits requested changes to the DTV table to result in up to 2% new interference to other existing allotments and facilities.[24]

When the appropriate standard is applied, Paxson's Petition plainly complies. The Petition causes new interference to only 1,159 of the viewers in WPBS-TV's licensed service area, only 0.5% of the station's baseline service population. This *de minimis* interference provides no basis for dismissing the Petition, and the Bureau's decision to the contrary must be reversed

CONCLUSION

For the forgoing reasons, the Commission should reverse the Bureau's decision in this case, reinstate the Petition, and direct the Bureau to issue a Notice of Proposed Rulemaking

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[22] 47 C.F.R. § 73 623(d).

[23] 47 C.F.R. § 73.623(c).

[24] 47 C F R. § 73.623(c)(2)

requesting public comment on Paxson's proposal. To the extent the Commission finds it necessary to reach accomplish these results, Paxson also urges the Commission to reverse its flawed decision in *Muskogee*.

Respectfully Submitted,

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Dated: March 18, 2004

CERTIFICATE OF SERVICE

I, Cynthia M Forrester, hereby certify that a true and correct copy of the foregoing Application for Review was sent on this 18th day of March, 2004, via First Class U.S. Mail, postage prepaid to the following:

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